All About That Face (No Trouble?) *An Analysis of the Dutch Ban on Face-Covering Garments in Light of the ECHR, ICCPR and CEDAW, together with Feminist Theory*

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ABSTRACT

The Dutch ban on face-covering garments (BFG) has caused a considerable amount of debate in the Netherlands since its entry into force on August 1, 2019. Questions have been raised as to whether this law is discriminatory towards those who wear full-face veils for religious reasons, as these individuals, almost exclusively women, will be excluded from public life based on their religion.

Inspired by this debate, this paper analyzes the Dutch BFG from a regional and international law perspective. More specifically, this paper seeks to analyze Dutch BFG in light of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Additionally, feminist theories play an auxiliary role in specifying CEDAW obligations from a feminist perspective.

While the ban may be justified from the point of view of the European Convention on Human Rights, it is problematic from the perspectives of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women. Further research should therefore investigate this tension to determine how these frameworks can be reconciled while considering that the standard set by the European Court of Human Rights only provides a minimum level of protection.

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1. INTRODUCTION

Today's societies are becoming increasingly multicultural and intertwined.[1] In the course of this development, clashes arise between the 'liberal, publicly secular and democratic' systems of modern Western countries and various religious orientations or beliefs and their practice.[2] A very prominent example of such conflict is the European debate surrounding the prohibition of face-covering clothing, such as full-face veils, in public spaces and when performing public functions.[3] With its entry into force on August 1, 2019, the Dutch ban on face-covering garments (BFG) has given rise to a considerable amount of debate on this issue in the Netherlands.[4]

The BFG is classified as a partial ban on face-covering garments, meaning that it prohibits people from wearing full-face veils and other garments in public transport and schools, hospitals or government buildings as well as their adjacent squares.[5] Violating the law is considered a misdemeanor and sanctioned with a fine of up to €415.[6] Classifying the offence as criminal entails additional, graver societal consequences. According to Article 53 of the Dutch Code of Criminal Procedure, every individual may hold or arrest another temporarily (the so-called *Burgerarrest)* if they catch the other in the process of committing a criminal offence in order to transfer them to a public prosecutor.[7] This can have social implications on women wearing full-face veils, such as not being able to take public transport or attend their children's graduation, as veils are banned in public buildings like universities.[8] Consequently, this has raised questions as to whether this law is discriminatory towards those who choose to wear full-face veils for religious reasons, as these individuals, almost exclusively women, will be excluded from public life on the basis of their religion.[9]

Roughly one year after introducing the ban, its implications for society and Dutch women in particular are slowly being evaluated by the public.[10] Especially in light of the current COVID-19 pandemic, which requires every citizen to wear face masks in public transport and public institutions, the necessity of and reasons behind a ban on face-covering garments are again under scrutiny.[11] Previous studies on the Dutch BFG have predominantly evaluated the ban in the context of the right to freedom of religion.[12] This research also considers the context of the influence of political changes in the Netherlands (e.g. the influence of liberalism)[13] as well as the (validity of the) public safety argument.[14] Additionally, the ban has been scrutinized from a Dutch legal theory perspective.[15]

Since the Dutch BFG is very recent in comparison to its European counterparts such as the French ban, little scholarly research has been done regarding the relationship between the Dutch BFG and the international legal framework on non-discrimination, specifically regarding women's rights.[16] This paper aims to contribute to filling this gap by analysing the Dutch BFG from a regional and international law perspective. Therefore, the Dutch BFG will be analysed in light of the European Convention on Human Rights (ECHR or the Convention), the International Covenant on Civil and Political Rights (ICCPR or the Covenant) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

These treaties have been chosen as they are all sources of women's rights and equal treatment. The ECHR secures the enjoyment of the rights and freedoms it guarantees without discrimination on any ground, including sex and religion. Likewise, the ICCPR calls on all State Parties to 'ensure the equal right of men and women to the enjoyment of all civil and political rights'.[17] In sum, the Covenant focuses on equality without distinction.[18] Building on this, the CEDAW took equality without distinction a step further by formulating rights specifically for women.[19]

Moreover, all aforementioned international legal documents are applicable to the Netherlands. The ECHR binds the Netherlands directly and is enforced through the European Court of Human Rights (ECtHR) and national courts. Obligations set forth by international treaties (such as the ECHR, ICCPR and CEDAW) are incorporated into the Dutch system by virtue of Articles 93 and 94 of the Constitution, provided that the provisions are generally binding. This enables individuals to directly refer to these provisions in a national court, given that the provisions are sufficiently precise and unconditional.[20]

In order to assess the ban in light of the applicable international treaties, it is necessary to first briefly examine provisions applicable to BFGs. A brief introduction of the Dutch BFG and its aims is therefore followed by an extensive analysis of the international perspective on BFGs. As there is not much literature available on the Dutch BFG, this analysis is done based on the example of the French BFG. Enacted in 2011, the ban was the first to be enacted in Europe and essentially contains a full ban on face-covering garments in public spaces (a blanket ban). The reasons for choosing the French ban for comparison are twofold. Firstly, the French ban has been discussed excessively in literature, as well as by the ECtHR and the Human Rights Committee (HRCee) which assess the fulfillment of States' obligations under the ICCPR. It is often considered to be the blueprint which the other bans were based off of.[21] Additionally, due to its nature as a blanket ban, the French BFG differs in scope from the Dutch ban, as the French ban is applicable to all public spaces, for example, streets and beaches, while the Dutch ban only applies to a few selected spaces (public transport, healthcare and public institutions including government buildings). Therefore, it is interesting to contrast both bans to see the extent that a less restrictive ban would be acceptable under the current standards of religious and women's rights.

Although the ECtHR and the HRCee differ in terms of authority, as the ECtHR is a judicial body and the HRCee is a

quasi-judicial one, both of these frameworks are important as they contain information on women's rights as well as more general provisions on equal treatment. Moreover, the ECHR provisions may not be interpreted in a way that conflicts with the higher standards set by the ICCPR and CEDAW, which makes it necessary to look at these higher standards more closely when evaluating BFGs in terms of the ECHR. What makes the analysis more interesting is that the ECtHR, HRCee and CEDAW Committee have different, sometimes conflicting views on BFGs.[22]

Concerning women's rights, obligations under CEDAW are vital to this assessment. Firstly, and most importantly, BFGs do not only affect religious individuals but specifically religious *women.* Consequently, including a feminist perspective is vital in such a debate. This allows for an analysis from an exclusively women's rights perspective and includes intersectional aspects of the problem. As Charlesworth and Chinkin point out, international law has many blind spots for women's concerns. Their message to feminists is to 'use existing mechanisms and principles wherever possible to improve women's lives'.[23] In response to this, the BFG for sake of consistency and its relation to CEDAW and international law will be viewed through the lens of feminist theories.[24]

By addressing BFGs from these three different perspectives in the order stated, the analysis moves from a more limited scope to a broader framework, which is complemented by a feminist outlook. Adding this feminist dimension provides more depth to the analysis, as it offers an additional lens through which the rights provided by the treaty bodies must be understood.

Due to the limited scope of this research, as well as the linguistic abilities of the researchers, this paper focuses mainly on English-speaking and European feminist scholars. While this choice significantly increases feasibility, it comes with the disadvantage that reliability and general applicability or broader relevance of this study may be reduced by excluding an entire body of feminist literature. These concerns have been mitigated in part by using translations and English works of non-Western authors.

Taken together, these three individual parts of the ECHR, ICCPR and CEDAW in light of feminist theory form the basis for an evaluative framework that allows for the subsequent analysis of the Dutch BFG. This analysis will scrutinize the Dutch ban in consideration of the 'criteria' derived from these frameworks. The conclusions provide for a normative assessment of the ban under the three different frameworks of rights, as well as suggestions for further research.

2. THE DUTCH BFG

To assess the Dutch BFG, a brief outlook on its rationale and goals must be given. The official and unofficial arguments behind the BFG can be distilled from its legislative history. The 15-year history of the BFG can roughly be separated into three phases, characterized by the specific interpretation given to the BFG in each phase. While they are in chronological order, the development of the BFG is not necessarily linear and shows diverging, often contradictory arguments. Tracing the genesis of the BFG, therefore, allows for a more comprehensive overview of its goals and aims, also taking unwritten arguments into account.

Between 2003 and 2008, or phase 1, the discussion centered mainly on the banning of Islamic face-covering garments. The public debate on face-veils was ignited by a case in Amsterdam.[25] Three Dutch-Moroccan girls entered their school wearing face-veils to the dismay of their teachers. The school requested the girls to stop wearing the face-veils, which the girls refused to do. Consequently, they were no longer allowed to enter their school. Two of the girls decided to take legal action and raised a complaint with the Dutch Equal Treatment Commission (*Commissie gelijke behandeling,* or CGB). The CGB stated that schools had an objective reason to ban face veils, as they hindered open communication and presented a security concern.[26] However, a 2006 report for the Dutch government found that neither a general, nor a specific ban on Islamic face-covering garments were justified from a legal perspective (Rapport overwegingen bij een boerkaverbod). Additionally, they found that banning all face-covering garments in all spaces was highly problematic, and that banning all face-covering garments from specific places could already be achieved with existing legal means.[27] This demonstrates that the need for a BFG was already criticized in the first phase. Following this report, two proposals for an Islamic BFG and a general, neutral BFG were made but did not enter into force.[28]

While Dutch Parliament was rather reluctant to adopt a BFG, it was nevertheless very present on the political agenda in phase 2 (2008–2012).[29] As a new Cabinet entered the political stage, a new phase in the debate about the prohibition of full face-veils began. In a letter to the parliament, the Cabinet declared that a general ban was not necessary since there were sufficient legal means to deal with security risks in public spaces and on public transport. Nevertheless, it was determined that a restriction on wearing full face-veils must be imposed as it hinders open communication. Therefore, the Cabinet proposed a prohibition of the full face-veil in all educational institutions and for civil servants.[30] Herein, parliament recognized that full-face veils contravened principles of good administration. However, they intended to solve this issue through preexisting legal means.[31] Including a BFG in public spaces in the coalition agreement demonstrated its priority on the public agenda but also limited the scope of the BFG considerably.[32] As such, phase 2 showed a development towards phase 3. However, a definitive change only occurred in 2012,

which marks the beginning of phase 3.

The most important change in this third phase was the introduction of criminal sanctions in a new legislative proposal. This was motivated by the idea that criminal sanctions give the perpetrator more protection and are applied more uniformly.[33] While the memorandum accompanying the BFG acknowledged the risk of discrimination on the basis of gender or religion, it found an objective justification in the fact that a prospective BFG would enable everyone to participate equally in social interactions, increasing openness and equality.[34] Although this proposal never entered into force, the follow-up proposal for a BFG in 2015 led to the present law.[35]

In essence, the government aims at striking a balance between freedom to dress as one wants on the one hand and the principle of recognizable communication on the other.[36] The restrictions set forth by the ban are justified by two reasons, namely facilitating communication and the provision of services in public spaces in line with the Dutch pluriform culture and increasing security in these spaces.[37] Additionally, another incentive for enacting the law instead of utilizing local or decentralized measures is improved uniformity of the rules to increase legal certainty and coherent enforcement. Although public security is not the main argument, as the language of the ban strongly focuses on increasing openness and equality, this argument played a role in the drafting process and needs to be considered when assessing the ban.

3. AN OUTLOOK ON BFGS FROM AN INTERNATIONAL LAW PERSPECTIVE

This chapter seeks to provide a base for the evaluative framework by analyzing the stance of the ECtHR, HRCee and CEDAW Committee on BFGs. Rather than providing a successive analysis of their case law, communications and provisions, respectively, this chapter takes the French BFG's aims as a point of departure, namely public safety and 'respect for the minimum set of values of an open and democratic society'.[38] As mentioned, this is mainly due to its extensive discussion in literature and case law, as well as its broader scope, which makes a comparison with the narrower Dutch ban interesting. Additionally, the goals of both bans are similar in the sense that they both seek to improve situations in which people need to interact or live together. The objectives of the French BFG are then analysed by considering the stance of the ECtHR and HRCee on the legitimacy and, most importantly, the proportionality of these aims. Thus, a legal framework is provided which can be used to scrutinize the official and unofficial aims of the Dutch BFG. This is then followed by a discussion of the rights listed in CEDAW that are applicable to the Dutch BFG.

In *SAS v France* (2014), the ECtHR first reviewed the French BFG.[39] In this case, the applicant claimed that the French BFG violated Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 14 ECHR (prohibition of discrimination).[40] Four years later, the HRCee received two complaints from applicants who found themselves in a similar situation (*Yaker v France* [2018] & *Hebbadi v France* [2018]).[41] Not only did they, similar to the applicants in *SAS v France*, claim that the French BFG violated their religious freedom as guaranteed by Article 18 ICCPR, they also believed it to be discriminatory in nature, thereby violating their rights under Article 26 ICCPR.[42]

3.1 INTERFERENCE

The first step in determining whether a BFG constitutes a violation of the rights guaranteed by Article 9 ECHR and Article 18 ICCPR was to consider whether there had been an interference with said rights.[43] Both the ECtHR and the HRCee acknowledged in *SAS v France* and *Hebbadi v France* and *Yaker v France* respectively that the French BFG, entailing a blanket ban of face-covering garments, constituted a limitation of Article 9 ECHR and Article 18 ICCPR.[44] They argued that the impugned measure meant that the applicant was faced with the dilemma of either dressing according to her religion and violating the French BFG in the process or complying with the BFG but having to renounce her religious convictions.[45] This complex dilemma meant that there was interference with the freedom of the applicants to freely practice their religion.[46]

Having determined that the impugned measure constituted a limitation of the freedom of religion, the ECtHR and HRCee were left to consider whether such infringements could be justified under the limitation clauses of Article 9(2) ECHR and Article 18(3) ICCPR.[47] This essentially meant that the ECtHR and the Committee had to determine whether the aims pursued by the BFG(s)—public safety and 'respect for the minimum set of values of an open and democratic society'—could be considered legitimate and proportionate in a democratic and plural society such as France.[48] Although the Court and the Committee reached a comparable outcome with respect to the legitimacy and proportionality of the aim of public safety, they diverged significantly with respect to the aim of 'living together'—both in terms of its legitimacy and proportionality.[49]

3.2 PUBLIC SAFETY

3.2.1 Legitimacy

The first objective the French BFG purported to pursue is that of public safety, which is a legitimate aim under

Article 9(2) ECHR and Article 18(3) ICCPR. Both the ECtHR and HRCee recognize ensuring public safety as a legitimate aim for, amongst other reasons, identification purposes and as a means of combating identity fraud.[50]

3.2.2 Proportionality

Having determined that the goals of the French BFG are, in principle, legitimate, it remained to be determined whether their pursuit was proportionate in the given context. In determining whether that was the case, States party to the ECHR were 'in principle, (...) afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is "necessary"'.[51]

This large degree of leeway relies on two premises. The first is the lack of consensus on the permissibility of BFGs among the State Parties.[52] The second is that, since the ban is a product of democratic deliberation, the French law can be thought to have already struck a balance between competing human rights and interests of minorities and the majority.[53] That being said, the ECtHR considers that, despite the wide margin of appreciation afforded to France, an intrusive measure such as a *blanket* BFG can only be considered proportionate for the sake of public safety if a State Party demonstrates that there is a general threat to public safety.[54] The French government failed to fulfill this requirement. Additionally, the Court observes that the objective that the French government wished to attain in terms of public safety—namely, the need to identify individuals in order to ensure the safety of persons and property and to combat identity fraud[55]—could have just as well been attained less intrusively. By obligating wearers of the burqa 'to identify themselves where a risk for the safety of persons and property has been established', the same result could be achieved,[56] and this was an obligation with which the applicant in *SAS v France* was willing to comply with.[57]

The HRCee was equally dismissive of the proportionality to public safety. Although the Committee 'recognizes the need for States, in certain contexts, to be able to require individuals show their faces' on a more or less one-off basis, it considers that a BFG such as the French one, which 'comprehensively prohibits the wearing of certain face coverings in public at all times' due to its blanket nature, cannot be considered proportionate.[58] For the pursuit of public safety to be considered proportionate, they must:

1. Demonstrate that banning a full-face veil is justified, as it represents a high threat to public safety or order.[59]
2. Justify why the BFG distinguishes between covering of the face for certain purposes (e.g. a niqab) and allows for others (e.g. sporting, artistry, etc.).[60]
3. Justify a blanket BFG based on specific contexts in which there are a 'specific and significant threat to public order and safety.'[61]
4. Demonstrate that a BFG is the least restrictive measure.[62]

It seems that the Court and the Committee reached the same outcome with respect to both the legitimacy and the (dis)proportionality of the aim of public safety of the French BFG. However, by explicitly placing the burden of proof on the State to justify the proportionality of a BFG in multiple respects, the HRCee seems to condition the permissibility of BFGs to a greater degree than the ECtHR, at least where it concerns the invocation of public safety as a legitimate aim.

3.3 VALUES OF AN OPEN DEMOCRATIC SOCIETY

3.3.1 ECtHR

The French government also justified the BFG with reference to the aim of 'respect for the minimum set of values of an open and democratic society.' This consisted of the values of respect for equality between men and women (I), respect for human dignity (II) and respect for the minimum requirements of life in society (III) (also referred to as 'living together' or in French: *vivre ensemble*).[63] In contrast to the objective of public safety, the ECtHR did not readily accept the legitimacy of the values which the French Government linked to the 'protection of the rights and freedoms of others' as a common concept. Instead, the ECtHR reviewed the legitimacy of each of the three values individually.

The first two values were discussed superficially, as neither warranted a great deal of reasoning. Concerning the aim of promoting gender equality, the Court briefly considered that a BFG cannot be invoked as a legitimate aim since doing so would come down to banning a practice that is 'defended by women—such as the applicant.'[64] Had the Court decided otherwise, it would have had to accept 'that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.'[65] As for human dignity, the Court considers that the wearing of face-covering garments must be considered '(...) an expression of a cultural identity which contributes to the pluralism that is inherent in democracy' that is not in violation of the wearers' nor the bystanders' dignity.[66]

In contrast to the first two aims, the Court devoted quite some considerations to the third aim—that of 'living together'. It considers 'that under certain conditions the "respect for the minimum requirements of life in society" (...) can be linked to the legitimate aim of the "protection of the rights and freedoms of others"'.[67] In the given context, the respect for the minimum requirements of life in society must be understood as

the possibility of open interpersonal relationships which is considered impeded by face-covering garments.[68] The face, as the government argued and ECtHR decided, is an indispensable element of interaction and interpersonal relationships. Protecting perhaps the most elementary condition for creating and maintaining interpersonal relationships—the showing of the face—could, therefore, be considered a legitimate aim.

At the same time, the Court notes that because the notion of 'living together' is 'flexible' (ambiguous), a careful examination of its necessity is warranted.[69] Such an examination takes the form of a balancing act in which the religious freedom (Article 9 ECHR) of those who wish to conceal their face for religious reasons is weighed against the rights and freedoms of others (the minimum requirements of life in society). In striking a balance between 'freedom of thought, conscience and religion' on the one hand, and 'dialogue and the spirit of concession' in a pluralistic society on the other hand, States (as mentioned previously) enjoy a broad margin of appreciation.[70]

Given this balancing act, the Court provided several arguments as to why the French BFG would be disproportionate: the small number of women affected, the threat it poses to the individual's (religious) identity, the fact that various national and international actors have opposed blanket BFGs and, finally, the risk that BFGs play into Islamophobic tropes and stereotypes.[71] Nevertheless, the Court gives more weight to the fact that the principle of 'living together' is not only considered to be a condition of a democratic society, but more importantly, a choice made by that democratic society; it is the French people that have chosen to accept it as a prevailing principle.[72] As such, the Court concludes that there has been no violation of Article 9 of the Convention, as it is obligated to assess the ban with a wide margin of appreciation.[73] The Court's recent decisions in *Dakir v Belgium (2017)* and *Belcacemi and Oussar v Belgium (2017)* show that its reasoning in *SAS v France* has remained valid, at least when it comes to the French and Belgian BFGs.[74]

3.3.2 HRCee

Compared to the relatively lenient approach of the ECtHR with regard to the principle of 'living together', the HRCee takes a much stricter approach. It considers that in order to invoke the protection of the fundamental rights and freedoms of others in the first place, the State is required to identify the specific fundamental rights and persons affected.[75] Living together, an abstract and vague notion, cannot serve as a legitimate justification in itself according to the HRCee.[76] Similar to the aim of public safety, the Committee gives due weight to the State's obligation to sufficiently demonstrate the necessity of a limitation. If the State fails to do so, the limitation is assumed to be disproportionate. On the other hand, one of the HRCee's members, Yadh Ben Achour, disputes the idea that the notion of 'living together' is vague or ambiguous and asserts that the concept is rather precise and specific. In his words, the notion of 'living together' '(…) is founded on the very simple idea that a democratic society can only function in full view of all.'[77]

Accordingly, even if the Committee were to consider it a legitimate objective, the applicant's rights under Article 18 ICCPR would still be violated, for the French government had failed to demonstrate that the BFG, as a blanket ban, is proportionate.[78] Additionally, and perhaps more importantly (at least for the purposes of this paper), the applicant claimed a violation of her rights under Article 26 ICCPR (right to non-discrimination). The HRCee's reasoning with regard to the discriminatory nature of the BFG is similar to that of the ECtHR with regard to public safety, namely that the French government failed to justify why a BFG would be reasonable in cases such as the applicant's but not in cases outlined by the exceptions.[79] However, the exceptions are, as Yadh Ben Achour mentions, *circumstantial* and *temporary*, whereas the burqa is neither.[80]

Furthermore, the French BFG seemed to be based on the assumption that the full-face veil is inherently oppressive towards women, in the sense that the obligation to wear the full-face veil is imposed by the patriarchy.[81] While this argument is neglected in the ECtHR case law, this was considered in the HRCee proceedings. The applicants that submitted their complaints to the ECtHR and HRCee, however, proved otherwise: all of them chose to wear a full-face veil voluntarily as an expression of their identity.[82]

Finally, rather than promoting pluralism and gender equality, the HRCee noted that the BFG runs the risk of '(…) confining them [fully veiled women] to their homes, impeding their access to public services and exposing them to abuse and marginalization'.[83] In this sense, the BFG could be considered counterproductive, not only to pluralism, which is actively suppressed by a BFG, but also to gender equality, which a BFG is likely to undermine.

The HRCee concluded that the impugned measure not only constituted discrimination, but a form of *intersectional* discrimination based on gender *and* religion.[84] As such, the principles of non-discrimination under the ICCPR and gender equality in the context of CEDAW are equally relevant. The explicit acknowledgment of intersectional discrimination in *Yaker v France* and *Hebbadi v France* is what truly sets apart the HRCee decisions from that of the ECtHR. While the ECtHR only briefly assessed (and rejected) the argument that the ban is conducive to gender equality, it failed to assess whether such a ban actively undermines it. The HRCee, on the other hand, considered that a BFG, far from promoting gender equality, discriminates on the basis

thereof. But in doing so, the HRCee's reasoning was quite limited. A more thorough assessment based on CEDAW and feminist theories is given in the following section in order to elucidate what the ECtHR left unanswered and the HRCee left unexplained.

3.4 CEDAW IN LIGHT OF FEMINIST THEORY

CEDAW has been established to advance the protection of women's rights. In order to achieve this aim, women's rights are declared through an international bill of rights for women and their implementation is supported by an agenda for national action to end discrimination against them.[85] Therefore, CEDAW adds a gender equality dimension to the principle of non-discrimination, drawing specific focus against discrimination of *women.* CEDAW obliges State Parties to eliminate both direct and indirect discrimination against women.[86] Consequently, CEDAW prohibits provisions prescribing different treatment explicitly based on grounds of sex and gender differences as well as provisions with a neutral wording in terms of gender differences but with a discriminatory effect in practice.[87] The Convention specifically addresses the equal treatment of men and women in the areas of education, employment and healthcare, where States must take measures to prevent and eliminate discrimination of all forms.[88] Discussing the Convention is especially relevant as the Dutch ban has implications in all three areas.

Another analytical framework to evaluate discrimination is intersectionality: the concept that different factors of someone's identity create a unique experience of oppression or disadvantage.[89] An intersectional analysis views the facets of social identity, such as gender, race and religion, as interrelated and mutually shaping each other.[90] In the context of the BFG, the relevant intersection of identities is that of gender and religion, as the BFG targets not only women but specifically *religious* women. This also speaks to the need for the discussion of the BFG from a women's rights or feminist perspective.

Within the general term 'gender equality', CEDAW proposes several specific focal points. In the case of the BFG, equality in terms of education, employment and healthcare, as well as the obligation to abolish discrimination, are relevant.[91] In its 1992 recommendation, the CEDAW Committee clarified its views concerning violence against women. According to the Committee, gender-based discrimination is discrimination which 'seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[92] The Committee hereby stresses access to work as well as health care as explicit examples. Moreover, the Committee clarifies that this discrimination can be perpetrated by public authorities directly by violating their positive obligation to prevent discrimination.[93] Therefore, it must be assessed whether BFGs are discriminatory in the context of CEDAW rights of non-discrimination and access to education, job opportunities and healthcare. Next to these three sections, feminist theory also provides another angle to assess the BFG.

Moreover, the argument of equal participation in society played a role in introducing the Dutch BFG. Especially in earlier stages of the legislative process, it was argued that women needed to be 'protected' from being forced to wear face-covering garments.[94] While this argument did not officially play a role in drafting the current ban (interestingly, the explanatory memorandum of the ban does not even mention the word 'women' and only refers to 'wearers of religious dress'), it is unlikely that this argument has simply been forgotten in the newer version. An assessment of this argument from a feminist perspective is therefore also interesting.

The topic of allowing or prohibiting Muslim women to cover themselves 'is difficult theoretical terrain for all feminists'.[95] This is illustrated by the debate among French and Muslim feminists. The introduction of the BFG in France sparked debate among French feminists. Those in favor of the ban argued that the full-face veil is oppressive and deprives women of their dignity, while those against it argued that the full-face veil is part of women's self-determination and the ban violates their rights.[96] In addition, faith-based and secular Muslim feminists diverged in their views on the meaning of Muslim women veiling themselves, the former not necessarily seeing it as a religious requirement and the latter seeing it as an expression of religious fundamentalism.[97] In the following sections, the focus is on three of the points: whether the ban is a symbol of oppression or choice, its relationship to career opportunities and its practical implementations. These arguments will be presented in relation to CEDAW.

3.4.1 Face-covering garments: oppression or choice?

Article 2 CEDAW imposes the obligation onto State Parties to end discrimination against women, including the abolishment of 'all customs and practices that constitute discrimination'.[98] Moreover, Article 5 CEDAW imposes the obligation to abolish cultural practices that are based on the inferiority or superiority of either of the sexes. In line with that argument, previous versions of the ban have argued that women need to be protected from oppression from wearing the face veil. Although this argument was not put forward in the enactment of the ban, it is highly unlikely that it was left behind completely, especially considering that it played such an important role in previous discussions.[99] From a feminist perspective, there are two sides to this argument: whether the face-covering garment is a form of oppression or a choice made by the women themselves. Badinter recognizes two types of women who wear the burqa: the '*revendicatrices*' (reclaimers),

or women who see the burqa as an expression of the democratic principle that people may dress as they wish, and the '*soumises*' (submissives),[100] who appear to lack the opportunity to voice their opinion on the practice and, thus, possibly wear the burqa under coercion.[101] With regard to the former category, Badinter argues that they are in the wrong since this democratic principle, at least in the Western tradition, includes only coverings of the body which exclude the face. Consequently, the 'revendicatrices' are invoking a principle that does not apply to the practice of Western countries. Regarding the 'soumises', Badinter does argue that it is necessary for democratic society to use the legal tools that can liberate them from these coercive circumstances: a 'burqa ban'.[102]

Berktay supports this idea, stating that the burqa is inherently oppressive as it springs from a theology of the maintenance of 'female purity' and is something compulsory for the women who believe in this concept.[103] Hessini aligns with this train of thought. She believes that veiling may indeed be liberating for Muslim women since they obtain respect and freedom within their religious community,[104] however, she argues that the choice of veiling is made within a traditionally patriarchal, and therefore restrictive, framework.[105] This view of the burqa is shared and substantiated by Habchi and Amara. These authors draw from their own experiences with the burqa in Algeria, where the burqa was used as a tool to deprive women of their most fundamental liberties.[106] Habchi states that the burqa confines women to the sexual sphere, further excluding them from the economic and social aspects of society.[107] Consequently, the practice of veiling in Western countries is seen as a mere extension of the oppressive practice of subservience in response to male pressure.[108]

The arguments proposed by Badinter, Berktay, Hessini, Habchi and Amara linking the veil to the oppression of women are mirrored in history. An example of this is the Taliban's regime in Afghanistan in the 1990s, during which women were forced to cover themselves in the context of multiple restrictive measures.[109]

While both feminist legal theories and history can portray the veil as oppressive, and therefore a ban as liberating, the opposite is also visible. In the 1970s, for example, women in Iran took up the veil as a form of 'political protest and revolutionary action'.[110] As a result, various feminist legal scholars argue that religious garments are not a symbol of oppression but one of assertion and affirmation of women's agency over the representation of their bodies.[111]

An illustration of arguments against the ban is given by Howard, who provides three reasons to assume that wearing a burqa is a choice rather than coercion.[112] Firstly, certain women wear the burqa as a means to reclaim and affirm their ethnicity and religion. According to Howard, this reason is most frequently given by older migrant women who hold on to the practices they are familiar with when faced with the new and unknown environment of their receiving country.[113] Additionally, others see it as a means of negotiating their own identity. These women have their own ideas on how they want to represent themselves in public and use their freedom to make the conscious decision of wearing a burqa. Howard argues that, taking this reason into consideration, a ban on the veil contravenes women's rights to autonomy and free choice as laid down in Article 8 ECHR.[114] She goes further and states that 'banning headscarves and other religious symbols is just as paternalistic and oppressive of women as forcing them to wear these'.[115]

This take on the BFG is shared by Zine. She states that just as under 'authoritarian theocratic regimes' in which women's bodies are regulated and disciplined by laws that oblige the women to wear burqas, women are oppressed in Western democratic societies where they are legally obligated to unveil themselves.[116] Both systems limit the women's expression of their own narrative of Islamic womanhood.[117] As an unintended, perhaps unexpected, side-effect of the (controversy surrounding the) burqa ban, some women have actually started to wear burqas to express their solidarity with those who are affected by the bans, thus demonstrating against the government and local authorities responsible for the ban.[118]

Moreover, the argument that women are pressured to wear the burqa by their family, community or religious leaders is contradicted by empirical research conducted by Gereluk among Muslim schoolgirls. Many girls who wore a hijab for reasons such as their parents' wishes did not perceive this as 'pressure' but instead as parental guidance and a sign of their love.[119] It remains difficult to ascertain what role the influence of family, community and religious leaders plays in the choice of girls and women to wear burqas since there is a lack of evidence that supports either the coercion or the choice theory. In practice, the underlying reasons are much more complicated and interwoven.[120]

In the context of the Dutch BFG, Moors points out that face-veiling women have publicly stated that they were not coerced to wear the face-veil, but to the contrary, chose to wear it.[121] This is further substantiated by empirical research Moors conducted in 2009. There are multiple reasons for Dutch Muslims to wear the veil: some wear it because they find it 'exciting' or 'fun', others see it as an expression of their Muslim identity and do it to show that veiled women can contribute to society as well.[122] However, they all agree that they were not forced to wear it and chose to do it themselves. In fact, many of the interviewees state that their parents and partners even opposed.[123]

As such, the problem is that a regulation that aims to promote gender equality has the exact opposite effect in practice in certain cases. However, this does not always have to be the case. The transnational feminist approach,

as developed by Kalantry, emphasizes that considering the context of both the migrant-sending and migrant-receiving countries in decision-making can mitigate these concerns. She encourages policymakers to gain knowledge on whether the factors that contribute to making a practice oppressive in one context are also present in another country's context.[124] In addition, she emphasizes that culture is not fixed in time and space. Consequently, the reasons for women to engage in a cultural practice in one country can differ from the reasons for women to engage in the same practice in a different country.[125]

Following the arguments from the feminist scholars cited above, Articles 2 and 5 CEDAW must be read with an understanding of the need for women to be free to wear the attire they like without additional social (or vocational) consequences attached to this choice. The discriminatory/stereotyping practice that must therefore be abolished is the BFG itself, as imposing a BFG creates the image that women need to be liberated, which removes their agency. This is especially true considering the view of the Committee that discrimination can be perpetrated by institutions, in this case towards women who choose to wear face veils.

3.4.2 Education and career opportunities

The second argument discussed in relation to a BFG is related to possible career opportunities. Article 10 and 11 CEDAW establish the obligation for State Parties to promote women's education and equal career opportunities in comparison to men. This does not only entail access to the same curricula, but also the obligation to reduce female dropout rates.[126] Herein, the argument put forward is that a (Muslim) woman has more career and educational opportunities when unveiled. Especially in the Dutch debate, the argument arose that it is necessary for everyone to communicate openly in educational spaces, as this guarantees a good quality of education.[127] While it is in line with CEDAW obligations to encourage women's education and ensure an equal quality compared to their non-Muslim/male counterparts, the way in which the BFG works might not fulfill this aim. The aim is currently formulated in a way that appears to be based on the Western conception of priorities and ambitions which attach societal relevance to professional success. This prioritization, however, is not necessarily the same for every citizen. In empirical research amongst women wearing full-face veils, Moors found that religion and family life prevail over career and education as a priority and means for societal success.[128] Imposing a certain stereotype on women of non-Western backgrounds runs counter to the aims that CEDAW strives to fulfill. Additionally, this presupposes that career and education, as well as social success, are mutually exclusive. This need not be the case, yet it is possible that societal perception of Muslim women and the visible intolerance towards them arguably contribute to this divide and forces women to choose.

The question arises whether a state can and should limit women in their choice between religion and family life or a professional career and societal success in the Western sense. This is in line with Taylor's argument that the underlying norms of human rights, including that of non-discrimination, are built on 'a specific moral outlook in Western history'.[129] She points out that in assessing cultural and religious practices, the specific, original context of the practice should be taken into account since 'against a culturally different moral background social differences—including gender differences—might be viewed as being invested with meaning and thus calling for differentiating practices'.[130]

If women wearing a full-face veil are not allowed in public buildings and on public transport, this will confront them with the choice to either surrender to the ban and forego the veil to have a successful career ('Western' version of success) or to keep on wearing their veil in accordance with their religious beliefs and the beliefs of their community ('non-Western' accepted version of success). In that sense, women who choose to wear the veil for religious reasons are treated unequally compared to both men as well as other women of non-Muslim background. Projecting these two versions of success runs counter to the principle of equality that is championed by CEDAW.

The Committee stresses the importance of education as a basis for overall societal success and adaptability and emphasizes the right for women to make a choice regarding their career opportunities.[131] While women are more highly certified overall, the Committee observes that men are, nevertheless, preferred over women when it comes to employment.[132] Therefore, the Committee argues that certification 'does not carry the same social currency for men and women'.[133] Institutionalized gender roles can therefore contribute to the persistent inequalities in access to education: 'The result is that rather than being transformative, institutionalized schooling becomes an instrument of the state for reproducing the gender order and maintaining the male/female, dominant/subordinate and public/private hierarchies'.[134] On one hand, the Committee stresses the obligation to remove barriers to women's access to education. On the other hand, the Committee also points out that parties should be responsible for eliminating prejudices and gender stereotypes that preclude women's access to education[135] instead of creating new ones that might hinder them from participation altogether.

3.4.3 Participation in public life

A third argument that can be derived from the feminist perspective is that the ban has controversial practical

implications, especially concerning the right to participate equally in public life. Even if the assumption were correct that all women prioritize professional life over family and religious life, BFGs are seen as problematic in that sense. Bribosia and Rorive have pointed out that the ban could have the exact opposite effect of what it aims to achieve.[136] If it is assumed that women wearing burqas are doing so under coercion, then prohibiting them to wear it in public could lead to their isolation and exclusion. In that regard, empirical research shows that women who have removed their face-veil due to bans felt that they did not do so due to being liberated, but more out of fear of social ramifications, and reported to socialize less as they felt uncomfortable being in public with their face uncovered.[137] Consequently, women reportedly feel that they are confined to their homes, either because they are not allowed to enter public spaces by the same males who coerce them into wearing burqas, and/or because they are afraid of verbal and physical aggression, confrontation and potential arrest (by the police).[138] The occurrence of such aggression could increase after the introduction of the BFG, as it reinforces the stereotyping of Muslim women.[139] Again, this runs counter to the obligation to abolish sex-based stereotypes. It is additionally questionable whether criminally prosecuting these women is at all desirable if they would be victims of a high degree of oppression and coercion.[140] Setting a criminal penalty on an action that is directly related to women's beliefs (and for which men cannot be criminalized, as they don't wear face-covering garments for religious reasons), appears to run directly counter to the aims of Article 2 (g) CEDAW which calls for State Parties to abolish criminal sanctions that are inherently discriminatory against women.

3.4.4 Access to healthcare

Lastly, from a CEDAW point of view, equal access to healthcare is important in the discussion of the ban's implications on women's rights. Article 12 CEDAW herein explicitly stipulates the right to equal access to healthcare, with a specific focus on the access to reproductive healthcare, as 'neglect of these services disproportionately burdens women'.[141] Access to healthcare must therefore not only be *equal compared to men* but also specifically adjusted to women's needs to guarantee an equal standard of healthcare. The CEDAW Committee stresses that particular focus should be paid to the rights to access to healthcare for migrant women. This provision specifically aims at tackling any intersectional discrimination that these women may face.[142] Additionally, the Committee explicitly mentions that one of the obstructing factors can be insufficient public transport to healthcare facilities.[143] Hence, the Committee stresses that State Parties should remove such barriers, not create more of them.

4. EVALUATIVE FRAMEWORK

In order to assess whether the Dutch BFG is compliant with these factors as well as the other factors mentioned above, an evaluative framework has been constructed which is presented in the following chapter. As mentioned, the Dutch BFG faces three standards of review, for it must be evaluated against the judgments of the ECtHR, the decisions of the ICCPR, and the positive obligations of States under CEDAW. While the ECtHR allows for a rather large margin of appreciation, assessing whether the BFG complies with ECHR norms is not the Netherlands' only concern. As mentioned, Dutch law integrates directly applicable provisions from international treaties by virtue of Articles 93 and 94 of the Constitution. Article 53 of the ECHR specifically states that obligations under the Convention cannot be used as an argument to disapply higher protection standards. For this reason, the Dutch BFG is evaluated in light of the two other international human rights frameworks that the Netherlands is part of before drawing joint conclusions.

First, from an ECHR perspective, it must be assessed whether a State can demonstrate that there is a general threat to public safety that cannot be countered by less intrusive means. This is also relevant in the case of the Dutch BFG, as one of the main arguments, next to open communication, is public safety. However, it needs to be kept in mind that, as the Netherlands has not enacted a *blanket* BFG covering all public spaces, the argument merits a brief discussion. Regarding the notion of living together, the French concept is legitimate as a BFG protects the rights and freedoms of others in interpersonal interactions. Additionally, it is proportionate as it is considered essential to the character of French civil society and is considered a conscious public choice. Therefore, the evaluation has to assess whether this equally applies to the Dutch case.

The second evaluative framework is based on the criteria set by the ICCPR. The HRCee agrees that, unless a state is able to demonstrate that there is a general threat to public safety that cannot be defended against by less intrusive means, the aim of public safety cannot be considered proportionate.[144] It must therefore again be assessed whether there is a general threat to public safety and whether there are less intrusive means available to achieve this goal. Secondly, according to the HRCee, the vague notion of living together is not a specific enough right to justify a BFG. The evaluation must assess whether specific rights are secured by the Dutch BFG.

In light of feminist theories, CEDAW implies that the Netherlands ought to refrain from acting in a way that results in (in)direct discrimination of women and strive for laws, policies and practices that ensure substantive equality between men and women. Consequently, for the more substantive view on intersectional discrimination

and its implications in relation to the burqa ban, the Dutch BFG is examined against the criteria established by CEDAW in consideration of feminist theories. As the ECtHR already confirmed that such a ban cannot promote gender equality, it remains to be determined whether it is adversely impacted. The obligations under CEDAW imply that laws must leave women with a choice regarding their personal attire, must further women's access to education and employment (without forcing them to trade in their social status) and must not compromise women's life on a daily basis. Hence, it must be evaluated whether the BFG has an adverse effect on women's lives in these areas.

5. EVALUATION OF THE BFG

5.1 THE ECTHR PERSPECTIVE

This first section evaluates the Dutch BFG in light of the ECtHR criteria. As it is rather similar to the French version in terms of its content, the evaluation limits itself to the most important points. The genesis of the BFG shows that the arguments of both public safety and open communication played a vital role in the enactment of the Dutch BFG. However, since the first stages, in which the public safety argument was more at the forefront of the debate, the importance of this argument has decreased. Accordingly, the evaluation of this argument is rather brief.

The threat to public safety has not been substantiated in parliamentary debates or the explanatory memoranda. While it is important to keep in mind that the ECtHR does not require countries to demonstrate public threat in detail due to the margin of appreciation afforded to them, it is interesting to note that the 2006 expert commission (CGB) report on the Dutch BFG found a blanket ban, such as the French ban, to be disproportionate.[145] Since the Dutch ban is not a blanket ban, it differs from the French one in scope.[146] Although it is less restrictive, it is questionable whether the Dutch ban can withstand the proportionality test, as it remains unclear whether less intrusive means could not achieve the same outcome. Referring back to the 2006 CGB report, it is notable that the expert commission appointed by the government found the then-existing administrative measures to be sufficient to achieve the BFG's goals. While the lawmakers in phase 3 chose a criminal sanctioning system in order to ensure legal certainty and uniform application, it is questionable whether this aim outweighs the social stigma that might come from the possibility of facing a *Burgerarrest*, especially if the same result could be achieved with administrative measures. As a result, it is likely that the Dutch ban, although more limited in scope, will face the same result as the French ban, namely that it might be legitimate but nevertheless disproportionate in securing public safety.

Regarding 'living together', the ECtHR substantiated its judgment with the argument that being able to see faces is both a condition for the functioning of French society as well as a conscious choice made by said society. While the Dutch have not invoked the concept of living together as such, the accompanying documents of the BFG state that the ban facilitates equal participation and communication, which is said to be in line with the Dutch pluriform society. Additionally, the debate that lasted for over a decade shows that Dutch society has engaged intensely in the topic, which arguably has led to a conscious societal choice. While a large margin of appreciation again makes it likely that the court will sustain this argument, its validity can nevertheless be questioned. First, one could claim that the pluriform Dutch culture could also be an argument against a BFG, as tolerance and openness towards others are inherent values to the Dutch society that ought to provide for the possibility to dress however one desires.[147]

Lastly, it can be argued that the ongoing debate over the BFG over the last decade shows that there is not necessarily a societal consensus concerning this topic. However, both arguments fall within the scope of the national margin of appreciation, which makes it unlikely that the court will address them in potential future proceedings. Based on the facts mentioned above, it can be argued that the Dutch BFG fulfills the ECtHR's requirements. However, as mentioned, the Netherlands is subject to a larger framework of human rights obligations which necessitates an analysis which also considers these frameworks.

5.2 THE ICCPR AND CEDAW PERSPECTIVE

When addressing the Dutch BFG from an ICCPR and CEDAW perspective, the arguments regarding public policy are remarkably similar to the arguments mentioned above. However, it must be stressed that the proportionality test is even stricter when looking at the issue from this perspective. It is remarkable that the fine for wearing a full-face veil (or other garment) in public is low compared to the aims of the BFG. Fines in the Netherlands range from €3 to €870.000, with the range being divided into 6 categories, where €400 is at the top of the first category.[148] If the goal was really to prevent violence or terrorist attacks, the fine should arguably be much higher. Additionally, as of October 2020, no fines have been issued yet, which leads to the suggestion that the law is not really enforced.[149] This reduces the strength of the public safety argument considerably, meaning that the proportionality test is not satisfied.

Much like in the French case, Dutch legislators have not identified a specific right that a BFG would protect; it essentially relies on the notion of living together. In that respect, the Dutch ban is unsatisfactory as well, as it is not made to protect a specific right. It needs to

be mentioned that the BFG has been connected to the right of good administration as well as legal certainty. It can be argued that a uniform BFG fulfills this principle better than the previous fragmented system. However, this idea was refuted by the earlier CGB reports as well as by the Dutch Council of State in 2015.[150] While this might be correct regarding the form of the BFG, it does not say anything about the underlying rights that a BFG (in whatever form) can safeguard. Hence, it is unclear whether the BFG fulfills the obligations set by the ICCPR.

Furthermore, it is likely that the BFG adversely affects women's rights under CEDAW. First, introducing the BFG reduces women's right to the choice of attire, as it restricts wearing specific garments in public spaces. In this context, it has been argued by feminist scholars that deciding whether to wear the veil is a form of oppression or choice must be interpreted with respect to women in the local context. This means that a generalization of all Dutch Muslim women based on foreign examples cannot be made. In the specific context of the Netherlands, Hass argues that the niqab is seen as a way for Muslim women to define their identity in a Dutch context, and this opportunity of self-defining should not be taken away from them.[151]

Additionally, the ban is not conducive to women's access to education. Herein, the biggest at-risk group is women older than 16 years of age. This is mainly due to the fact that compulsory education ends after the age of 16 (Education in the Netherlands). This entails that women (and men) above this age have the freedom to choose between pursuing an education or moving on to other endeavors. The enactment of the BFG is therefore likely to push women away from choosing the educational path. Additionally, a BFG would put women in a position where they must choose between education and possible career opportunities or honoring their cultural values and societal status, which runs counter to the equal right to education under Articles 2 and 10 CEDAW. By creating the BFG, the Dutch government partly institutionalizes the stereotypes which the veil aimed to remove. Persistent inequality might therefore become entrenched, as education is seen as the stepping stone to a successful career life. It is not one of the BFG's aims itself to promote career opportunities for women. However, in the way that it is currently working, it actually can have the exact opposite effect, by actively *hindering* them.

Considering career opportunities, women will arguably be limited in their choice of career, as their mobility is hindered by a ban on face-covering garments in public transport. Again, this conflicts with the right to have equal career opportunities. As the current labor market prefers men over women despite women being more highly certified, the ban creates an extra hurdle for women.[152] This is also because employers might prefer women without full-face veils in order to avoid possible legal consequences that come with the ban.

Women's lives will likely be compromised, not only in terms of their access to healthcare, but also regarding their daily routine, as a ban is likely to confine them to their homes.[153] It is irrelevant whether this is the result of their male family members banning them from leaving the house or out of fear of a prospective *Burgerarrest*. Deterring women from leaving their homes cannot be said to be in compliance with any of the State Parties' obligations under CEDAW.

Lastly, the lack of mobility caused by a ban on public transport is also relevant for the right to access to healthcare. Knowing that face-covering garments are prohibited in public spaces such as hospitals or doctor's offices, women might be less inclined to seek medical assistance for themselves. This does not only have implications for themselves but potentially for their children as well, as they are then dependent on their fathers for medical appointments. This runs counter to the literal wording of Article 12 CEDAW which stresses the equal access of men and women to healthcare services. It is interesting to note here that Dutch government representatives were called upon by Dutch doctors to remove healthcare facilities from the ban, as they saw a real danger for a decrease in access to healthcare for Muslim women.[154] Since patients seeking treatment have to identify themselves in order to be admitted to a doctor's appointment, the doctors calling for the exclusion of healthcare facilities from the ban believe that the need for prohibiting face-covering garments in healthcare facilities is not necessary from a security point of view.[155] Consequently, it can be argued that the Dutch BFG does not conform to CEDAW obligations as interpreted in light of feminist theory nor to the obligations set out by the ICCPR.

6. CONCLUSION

This article set out with the intent to understand the Dutch BFG in consideration of the applicable international legal provisions with an additional focus on women's rights. Viewed through the lens of the ECtHR, it has been demonstrated that the ban can be evaluated in a similar manner to the French BFG. Regarding the argument of public safety, the ban is likely to be considered legitimate but disproportionate due to the unclear social implications that it has on the women affected by the ban. The argument of open communication and equal participation appears to be justified, as it is indirectly based on the principle of living together, which the ECtHR considers legitimate. While some questions arise regarding the societal consensus of the ban, these are not relevant on an international level, as they are likely to fall within the Dutch margin of appreciation. From this, it can be assumed that it is likely that the ban is justified under the ECtHR's current standard of assessment. While

the ECtHR may therefore find the ban acceptable in the present circumstances, it only provides for a minimum standard regarding human rights protection.

However, the ban cannot be justified within the greater framework of human rights protection under the ICCPR and CEDAW. Neither with respect to the aim of public safety (the BFG is disproportionate in this regard), nor with respect to the aim of 'living together' which, the HRC observes, is an illegitimate aim in and of itself. The lack of a specific right that the BFG aims to protect contributes to the argument that the BFG cannot be justified under the rights set forth in the ICCPR. Most clearly, the BFG is problematic in light of CEDAW. Analysis from the perspective of feminist theory demonstrates that it is unlikely that a BFG will 'liberate' women. Instead, it has the opposite effect by confining them to their homes with the possibility of hindering equal career opportunities as well as impacting women's access to education and appropriate healthcare.

Not only do the possible negative consequences for the affected women outweigh the public benefit that the ban aims to achieve, but the BFG appears to directly counter the obligations concerning (women's) rights set forth in the ICCPR and CEDAW. Although it can be argued that the HRCee and ECtHR have no coercive power, the provisions of the ICCPR and CEDAW can still become directly applicable under Dutch law by virtue of Article 93 and 94 of the Constitution, provided that the rights are unconditional and precisely worded. This could open the door to individual action in a Dutch court against the ban. While it goes beyond the scope of this research to decide whether invoking the first two conventions in a national court would be successful, the results of this paper suggest that there may be a possibility of contesting the ban based on these provisions.

The above analysis shows that the ban is acceptable from an ECHR point of view. However, it is highly questionable whether the Netherlands should adhere to it when considering their broader human rights obligations. Especially in light of the COVID-19 pandemic where face-covering is not the exception, but the norm, it is necessary to dismantle the stereotypes that are hidden behind the ban and reconsider the validity of its existence. A positive focus on women's rights, actively strengthening equal access to education and healthcare, and including the affected women in the creation of measures could contribute to the realization of their human rights whilst having a potentially larger beneficial impact on society compared to the current approach.

NOTES

1 Peter Kivisto, *Multiculturalism in a global society* (John Wiley & Sons 2008) 1.

2 Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77 Mod L Rev 223.

3 'The Islamic Veil Across Europe' *BBC* (31 May 2018) <*https://www.bbc.com/news/world-europe-13038095*> accessed 31 December, 2019.

4 Wet van 27 juni 2018, houdende instelling van een gedeeltelijk verbod op het dragen van gezichtsbedekkende kleding in het onderwijs, het openbaar vervoer, overheidsgebouwen en de zorg (Wet gedeeltelijk verbod gezichtsbedekkende kleding) (*Dutch BFG)*; Jack Guy 'The Netherlands has introduced a "burqa ban" - but it's enforcement is in doubt' *CNN* (1 August 2019) <*https://edition.cnn.com/2019/08/01/europe/netherlands-burqa-ban-scli-intl/index.html*> accessed 2 February 2020; Monique Evers, 'Geweigerde Limburgse nikabdraagster: 'Ik wil gewoon met de bus kunnen reizen' *De Limburger* (21 August 2019) <*https://www.limburger.nl/cnt/dmf20190820_00119232*> accessed 25 January 2021; Cyril Rosman, 'Nauwelijks nog meldingen over boerka's in het openbaar vervoer' *De Limburger* (8 February 2020) <*https://www.limburger.nl/cnt/dmf20200207_00146703*> accessed 25 January 2021.

5 Dutch BFG (n 5) Article 1. Exceptions for the main rule are made if (1) the face-covering garments is worn in residential parts of health-care institutions (the health-care institution can decide to extend this exception for the entire facility in case of long-term stay) (2) the face-covering garment is necessary to protect the body for health or safety reasons (3) the face-covering garment is needed in the framework of exercising one's profession or a specific sport or (4) wearing the face-covering garment is adequate in terms of cultural or festive activities.

6 Dutch BFG (n 5) Article 1 together with Wetboek van Strafrecht (*Dutch criminal code*) Article 23 sub 4.

7 Wetboek van Strafvordering (*Dutch code of criminal Procedure)* Article 53.

8 'Vier vragen beantwoord over het boerka-verbod' (*AD.nl*, 31 July 2019) <*https://www.ad.nl/binnenland/vier-vragen-beantwoord-over-het-boerka-verbod-br~a8b9ed9a/?referrer=https://www.google.com/*> accessed 23 January 2020.

9 Aukje Muller, 'Exclusion through the Law: the Netherlands' "Burqa Ban"' (*rug.nl*, 16 September 2019) <*https://www.rug.nl/research/centre-for-religious-studies/religion-conflict-globalization/blog/exclusion-through-the-law-the-netherlands-burqa-ban-16-09-2019*> accessed 4 February 2020.

10 See e.g. 'Geen boetes en slechts vier waarschuwingen voor boerkaverbod' *Hartvannederland (21 October 2020)* <*https://www.hartvannederland.nl/nieuws/2020/geen-boetes-en-slechts-vier-waarschuwingen-voor-boerkaverbod/*> accessed 23 November 2020. See also, ' Meer islamofobie gemeld sinds invoering boerkaverbod' (*NRC)* <*https://www.nrc.nl/nieuws/2020/09/21/meer-islamofobie-gemeld-sinds-invoering-boerkaverbod-a4012918*> accessed 23 November 2020.

11 See e.g. Mario Ricca, 'Don't Uncover that Face! Covid-19 Masks and the Niqab: Ironic Transfigurations of the ECtHR's Intercultural Blindness.' (2020) International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique 1; Simon van Oort, 'De burka, het mondkapje en de Wet gedeeltelijk verbod gezichtsbedekkende kleding' (2020) 25 NJB 1562.

12 Sally Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 (4) *Yale Law Journal* 1089.

13 E.g. Gina Gustavsson, Jolanda Van der Noll and Ralph Sundberg, 'Opposing the veil in the name of liberalism: Popular attitudes to liberalism and Muslim veiling in the Netherlands' (2016) 39 (10) Ethnic and Racial Studies 1719; Alessandro Ferrari and Sabrina Pastorelli (eds), *The Burqa Affair Across Europe: Between Public and Private Space* (Routledge 2016).

14 Nilay Saya and Stuti Manchanda, 'Do burqa bans make us safer? Veil prohibitions and terrorism in Europe' (2020) 27 (12) Journal of European Public Policy 1781.

15 Jos Vleugel, 'Religie, belangenafweging en neutraliteit' (2019) 10 (3) Tijdschrift voor Religie, Recht en Beleid 32.

16 Loi n°2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l›espace public publiée au Journal Officiel du 12 octobre 2010 (*French BFG*).

17 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 3.

18 R. Christopher Prestion and Ronald Z. Ahrens, 'United Nations Convention Documents in Light of Feminist Theory' (2001) 8 Mich. J. Gender & L 1, 16-17

19 ibid 17.

20 Janneke Gerards, 'The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It' (2016) 77 (2) Revue interdisciplinaire d'études juridiques 207, 2016 f.

21 Shu-Perng Hwang, 'Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgments of the European Court of Human Rights on the "Burqa Bans"', (2020) 20 Human Rights Law Review 20, 361.

22 The case law of the European Court of Justice is omitted, as it mainly focuses on the headscarves in horizontal (employment) relationships, which covers fundamentally different situations than the ban at hand. Moreover, often the CJEU aligns itself with the judgments of the ECtHR and interprets the EU Charter.

23 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000)

24 ibid.

25 Annelies Moors, 'The Dutch and the face-veil: The politics of discomfort' (2009) 17 (4) Social Anthropology 393, 396

26 CGB, 20-03-2003, nr. 2003-40, ECLI:NL:XX:2003:AN7464.

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50 *S.A.S. v France* (n 39) [115]: (…) the impugned ban on wearing, in public places, clothing designed to conceal the face satisfied the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud; *Yaker v France* (n 39) [8.7]: the need for States (…) to be able to require that individuals show their faces, (…) in specific circumstances of a risk to public safety or order, or for identification purposes.

51 *S.A.S. v France* (n 39) [129].

52 ibid [130]. In their dissenting opinion, judges Nussberger and Jäderblom dispute the Court's insistence that there is no consensus among the member states regarding the enforcement of BFGs. The fact that forty-five out of forty-seven member states do not enforce BFGs constitutes, according to the judges, at the very least a *tacit* consensus. See *S.A.S. v France* (n 39) Dissenting Opinion Nussberger and Jäderblom [19].

53 *S.A.S. v France* (n 39) [154].

54 ibid [139].

55 ibid [139].

56 ibid [139].

57 ibid [13].

58 ibid [8.7]

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61 *Yaker v France* (n 39) [8.7]. Interestingly, however, in his dissenting opinion Yadh Ben Achouar asserts that the general threat to public safety is 'self-evident given the ongoing battle against terrorists.'; see *Yaker v France* (n 39) Dissenting Opinion of Yadh Ben Achouar [2].

62 ibid [8.8].

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The authors have no competing interests to declare.

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